Supreme Court, U.S.
FILED
AUG 16 1974
MICHAEL RODAK, JR., CLERK

Nos. 73-1377 and 73-1378

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1377

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, *Petitioner*

vs.

THE CITY OF NEW YORK on Behalf of Itself and All Other Similarly Situated Municipalities Within the State of New York, et al.

No. 73-1378

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, *Petitioner*

vs.

CAMPAIGN CLEAN WATER, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF MINNESOTA

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BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF MINNESOTA

QUESTIONS PRESENTED

1. May the Administrator of the U.S. Environmental Protection Agency ignore Congressional intent and the mandatory requirements of the Federal Water Pollution Control Act Amendments of 1972 by refusing to allot to the States the full sums authorized by Congress to be appropriated for the construction of publicly owned sewage treatment works?

2. If the Administrator had any discretion in controlling the rate of spending for construction of publicly owned sewage treatment works was it erroneously exercised in that (a) it was exercised at the allotment stage rather than obligation stage; (b) the decision was based upon evaluation of competing national policies, priorities, goals, and objectives other than those established by Congress; (c) the amount withheld effectively frustrated achievement of the goals and purposes of the Act, and (d) in impounding the funds the Administrator sought to do indirectly what Congress directly forbade him to do by overriding the Presidential veto of the Act?

3. Is the allotment of funds within the narrow exception of being so "committed to agency discretion" that it is beyond judicial review even though the Act provides adequate standards by which the discretion may be evaluated to determine whether it was erroneously exercised?

STATEMENT OF THE CASE

The cases before the Court present issues of statutory construction to determine the existence of discretion, or the extent of any such discretion, granted to the Administrator of the United States Environmental Protection Agency (hereinafter the Administrator) in allotting funds among the States pursuant to the Federal Water Pollution Control Act Amendments of 1972 (hereinafter the Act).[1]

The pervasive objective of the Act as stated in Section 101(a) "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Congress declared in Section 101(a)(4) of the Act that "it is the national policy that Federal financial assistance be provided to construct publicly owned treatment works; . . . ." This policy is a vital part of the Act and is essential to achieve its objective. Congress authorized to be appropriated amounts not to exceed $5 billion for fiscal 1973, $6 billion for fiscal 1974 and $7 billion for fiscal 1975 to carry out this policy. Section 207.

The President vetoed the Act on October 17, 1972. The President in his message to Congress stated:

> Even if this bill is rammed into law over the better judgment of the Executive—even if the Congress defaults its obligation to the taxpayers—I shall not default mine. Certain provisions of S. 2770 confer a measure of spending discretion and flexibility upon the President, and if forced to administer this legis-

[1] Pub. L. 92-500 (Oct. 18, 1972), 86 Stat. 816, 33 U.S.C. 1251, et seq. The Act is commonly referred to by section rather than by its Code Citation. Therefore all references to the Act hereinafter will be by section number of the Act as enacted, Pub. L. 92-500.

> lation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.

118 Cong. Rec. S. 18534-35 (Daily ed., October 17, 1972).

Congress considered the veto message and overwhelmingly overrode the veto. In the House, the vote was 247 to 23; in the Senate, it was 52 to 12. The President's intention was later carried out by his directive to the Administrator to allot to the States $2 billion instead of the $5 billion authorized for fiscal 1973, $3 billion instead of the $6 billion authorized for fiscal 1974 and, although not an issue herein, $4 billion instead of the $7 billion authorized for fiscal 1975.

Respondent City of New York has obtained from the Court below an order which compels the Administrator to allot among the States the full amounts authorized by Congress. Respondent Campaign Clean Water has obtained an order for a *de novo* review of the Administrator's decision to determine if he abused his discretion. Petitioner seeks review of both cases, which have been consolidated in this Court.

INTEREST OF AMICUS CURIAE

The Court's decision in these cases will substantially affect the State of Minnesota by setting a precedent which will be decisive in its case against the Administrator in the United States Court of Appeals for the Eighth Circuit. Minnesota obtained from the United States District Court for the District of Minnesota, Fourth District, an order to compel the Administrator to allot to Minnesota the full sums Congress authorized to be appropriated for the construction of publicly owned

treatment works as provided in Sections 205 and 207 of the Act.[2]

The Administrator appealed the order to the Court of Appeals for the Eighth Circuit. Written briefs and oral argument have been presented to the Court of Appeals. The case is presently pending for decision. Minnesota's case involves virtually identical issues to those involved in the cases presently before the Court.

The Administrator's action resulted in a drastically reduced allotment to the State of Minnesota. For fiscal years 1973 and 1974 Minnesota received a total of $101.5 million instead of the $222.5 million authorized, or a total reduction of $121 million. The direct effect on Minnesota is that numerous sewage treatment works in the State will not be constructed or upgraded. Consequently, the cutback on the allotments to Minnesota guarantees that its municipalities and sanitary districts will fail to meet the requirements and goals of the Act.

There is an adverse environmental effect from the Administrator's refusal to allot because inadequately treated sewage and industrial wastes will continue to be discharged into Minnesota waters. The stoppage of construction of treatment works for fiscal 1973 is estimated to result in a flow of 285 million gallons per day of inadequately treated sewage. The pollution and health effects from untreated sewage are well established.

The State of Minnesota has great interest in achieving and maintaining high water quality necessary for the propagation

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[2] *State of Minnesota v. Fri*, No. 4-73, Civ. 133 (D. Minn., June 25, 1973). The opinion and order of Federal District Court Judge Miles W. Lord has not been reported. The factual references made herein by the State of Minnesota are based on affidavits that are part of the record in Minnesota's case. The affidavits were not disputed by the Administrator.

of fish and wildlife and recreation in and on its waters. The recreational benefits accruing to the State from fish and game are estimated to be valued at approximately $200 million per year. Pollution from untreated sewage primarily causes oxygen depletion and artificial enrichment of lakes and rivers which adversely affect the propagation of fish and recreational uses. Construction of secondary treatment facilities reduces or eliminates these detrimental effects.

Minnesota urges that the result in this case should be to require the Administrator to allot the Congressionally authorized funds now withheld from the States.

SUMMARY OF ARGUMENT

1. Under the Act the Administrator has no discretion to determine the amounts to allot among the States. The Act contains mandatory language that the $5 billion and $6 billion for fiscal years 1973 and 1974, respectively, " *shall be allotted by the Administrator.*" Congress intended the full sums authorized to be appropriated to be allotted among the States. This intent is manifested in the Act as a whole and its legislative history.

2. If the Administrator has been granted *any* discretion by the Act he exercised it erroneously. First, any discretion rests at the *obligation* stage instead of the *allotment stage.* Second, even if there existed discretion at the allotment stage it was flagrantly abused by the Administrator. His discretion is circumscribed by the bounds of the Act and may not be exercised for reasons remote and unrelated to the Act. Third, the refusal to allot 55% of Congressionally authorized funds was an abuse of discretion because it was in derogation of the policy and goals established by Congress in the Act. The impoundment of the authorized funds was an attempt to undo what Congress accomplished by exercising its Constitutional right to override the Presidential veto of the Act: emphatically mandating that the full $18 million be allotted to the States.

3. The Administrator's action does not fall under the narrow exception of the Administrative Procedure Act making nonreviewable actions totally committed to Agency discretion where the statutory authority is so broad that there is no law to apply. The Act provides definite standards against which the Administrator's action can be reviewed to determine if he has misconstrued his powers and abused his discretion.

ARGUMENT

I. THE ACT AND ITS LEGISLATIVE HISTORY INDICATE THE ADMINISTRATOR HAS NO DISCRETION TO CURTAIL AUTHORIZED FUNDS AT THE ALLOTMENT STAGE.

A. The Act Manifests Clear Congressional Intent to Attain Clean Water.

The Act is a comprehensive and far-reaching law designed to clean up the Nation's waters. The provisions for Federal financial assistance to construct publicly owned treatment works are major features of the Act and a keystone of the statutory objective. It is important that these financial provisions be put in proper context with other provisions of the Act relevant to the statutory scheme to attain clean water.

The Act begins by stating that its objective "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a). To achieve this ob-

jective, Congress declared as goals of the Act that "the discharge of pollutants into the navigable waters be eliminated by 1985" and that "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." Section 101(a)(1), (2). Congress unequivocally stated in the Act that "it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works." Section 101(a)(4).

Title II of the Act is entitled "Grants for Construction of Treatment Works." The purpose of this title is "to require and to assist the development and implementation of waste treatment plants and practices which will achieve the goals of this Act." Section 201(a). The Administrator "is authorized to make grants to any State, municipality, or to intermunicipal or interstate agency for the construction of publicly owned treatment works." Section 201(g)(1). Congress "authorized to be appropriated to carry out this title . . . for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000 and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000." Section 207.

A state's share of the authorized amounts for fiscal 1973 and 1974 is determined by a statutory formula based on "the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears on the estimated cost of construction of all needed publicly owned treatment works in all of the States." Section 205. Allotments to the States commencing in fiscal 1975 are to be made in accordance with revised cost estimates submitted to and approved by Congress. Section 205(a).

The designated shares are to be allotted among the States by the Administrator. Those allotted funds then are available for grants to construct publicly owned treatment works within the State. Section 203. An individual applicant for a grant submits plans, specifications, and estimates for each proposed project to the Administrator for his approval. Approval of the plans, specifications, and estimates by the Administrator is deemed to constitute a contractual obligation of the United States for the payment of its proportional contribution to such project. Section 203(a).

Prior to final approval of a treatment works project, the Administrator must consider the "limitations and conditions" of Section 204. For example, the Administrator is to determine that (a) the treatment works is in conformity with any applicable State plan under Section 303(e) of the Act, (b) such works have been certified by the appropriate State water pollution control agency as entitled to priority over such other works in the State, (c) there are adequate provisions satisfactory to the Administrator for assuring proper and efficient operation and maintenance, and (d) the size and capacity of the works relate directly to the needs to be served by the works. Section 204(a)(2), (3), (4) and (5).

The Federal share of the construction costs for approved projects is 75 per centum. Section 202(a). Expenditures of allotted funds are to be made by the Administrator in the form of payments to the recipient of a grant as the work progresses and costs of construction are incurred on the project. Section 203(b).

The successive administrative stages involving Title II grants thus include:

(a) the *authorization* of funds to be appropriated, Section 207,

(b) the *allotment* by the Administrator of these funds among the States, Section 205,

(c) the *submittal* by the grantees of plans, specifications and estimates of treatment works projects to the Administrator for approval, Section 203,

(d) the *review* by the Administrator of the projects pursuant to the limitations and conditions of Section 204,

(e) the approval by the Administrator of the project which thereby *obligates* the Federal government to pay 75 percent of the eligible costs, Section 203, and

(f) the *payment* to the grantees by the Administrator of project progress payments from the allotted funds, Section 203, and the *appropriation* by Congress of the funds necessary to cover the Administrator's expenditures on the project.

The issues before the Court involve the Administrator's action at the *allotment* stage.

Title III of the Act is entitled "Standards and Enforcement." The discharge of any pollutant by any person is unlawful except when in compliance with various sections of the Act. Section 301(a). Persons operating publicly owned treatment works are included and are subject to enforcement actions.

Section 301(b) provides that "[i]n order to carry out the objective of this Act there shall be achieved . . ." for all publicly owned treatment works secondary treatment by July 1, 1977, and the best practicable waste treatment technology by July 1, 1983. States are prohibited from adopting or enforcing an effluent limitation that is less stringent than those established under the Act. Section 510.

Title VI of the Act is entitled "Permits and Licenses." Section 402 establishes the National Polutant Discharge Elimination System (hereinafter NPDES) which requires permits be obtained for the discharge of polutants. The discharges from publicly owned treatment works require an application for an NPDES permit. Section 402(a). These permits must "insure compliance with, any applicable requirements of sections 301, 302, 306, 307 and 403; . . . ." Section 402(b)(1)(A). Neither the Administrator nor a State can issue a permit to a publicly owned treatment works under Section 402 which does not insure that requirements of the existing water quality standards are complied with or that effluent limits of secondary treatment are achieved by July 1, 1977.

Any person, which by definition includes a municipality or a sanitary district, Section 502(5), found willfully or negligently violating the effluent limitations of Section 301 is punishable by a fine of not less than $2,500 nor more than $25,000 per day of violation or by imprisonment for not more than one year, or by both. Section 309(c)(1). Any person who merely violates Section 301 effluent limitations is subject to a civil penalty not to exceed $10,000 per day of such violation. Section 309(d).

If the Administrator finds any person in violation of Section 301, he is required to issue an order to obtain compliance or to bring a civil action. Section 309(a)(3). A person who violates an order issued by the Administrator is subject to the civil penalty provision. Section 309(d). Whenever a municipality is a party to a civil action brought by the United States, the State is to be joined as a party. The State is liable to the extent that its law "prevent[s] the municipality from raising revenues needed to comply with such judgment." Section 309(e).

Any citizen adversely affected may commence a civil action against any person who is alleged to be in violation of an effluent standard or limitation under the Act. Section 505(a) and (g). Federal district courts are given jurisdiction over these suits to enforce effluent standards and to apply any appropriate civil penalty under Section 309(d) of the Act. Section 505(a)(2). Any interested person may seek judicial review of any NPDES permit issued or denied under Section 402. Section 509(b)(1)(F).

The statutory scheme includes a broad objective, with declared goals and policies, established deadlines for achievement of effluent standards and limitations, permits for discharge of pollutants, and strong enforcement penalties to assure compliance. The Administrator's refusal to allot 55% of the funds authorized must be viewed from the total perspective of the Act. These features of the Act cannot be isolated from Sections 205 and 207. The Administrator's narrow focus on Sections 205 and 207 distorts the clear thrust of the Act which is to abate water pollution.

B. The Statutory Scheme Imposes a Clear Mandatory Duty Upon the Administrator to Allot.

The requirement to *allot* the full amounts is clear and unambiguous.

> Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, ***shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized,*** except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972.

(Emphasis added.) Section 205(a).

Contrary to the Administrator's contention, the authorized funds do not remain indefinitely available for allotment. Section 205(b)(1) provides:

> *Any sums allotted* to a State under subsection (a) shall be available for obligation under section 203 on and after *the date* of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of *the fiscal year for which such sums are authorized.* Any amounts *so allotted* which are not obligated by the end of such one-year period *shall be immediately reallotted* by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the *last allotment of sums* under this section. *Such reallotted sums* shall be added to the *last allotments* made to the States. Any sum made available to a State by *reallotment* under this subsection shall be in addition to any funds otherwise allotted to such State for grants under this title during any fiscal year.

(Emphasis added.)

Only the funds *allotted* by the Administrator remain available for obligation. If the Administrator does not follow the statutory requirements by allotting and immediately reallotting[3] the authorized funds at the time and dates indicated,

[3] The State of Minnesota in its case obtained an Order dated June 25, 1974, for supplemental injunctive relief compelling reallotment in 1974 of the state's share of unobligated 1973 funds. It was Minnesota's position that if the Administrator did not "immediately reallot" the fiscal 1973 funds which were ordered to be allotted these funds would be irretrievably lost and not available for obligation. The Administrator by the supplemental Order was thereby not allowed to accomplish by reason of a lengthy appeal process what he was unable to accomplish under the Order to allot the full sums authorized for Minnesota.

the unallotted funds lapse and are irretrievably lost to the States. The mandatory language of Section 205 precludes *supplemental allotments*. Numerous courts have arrived at the same conclusion. *City of New York v. Train*, 494 F.2d 1033 (1974); *State of Ohio v. Environmental Protection Agency, et. al.*, C. 73-1061 and C. 74-104 (N.D. Ohio, June 26, 1974); *State of Maine v. Train*, Civ. No. 14-51 (D. Maine, June 21, 1974); *State of Florida v. Train*, Civ. No. 73-156 (N.D. Fla., Feb. 25, 1974); *State of Texas v. Ruckelshaus*, C.A. No. A-73-CA-38 (W.D. Tex., Oct. 2, 1973); *Martin-Trigona v. Ruckelshaus*, No. 72-C-3044 (N.D. Ill., June 29, 1973); and *State of Minnesota v. Fri*, No. 4-73, Civ. 133 (D. Minn., June 25, 1973).

The State of Minnesota does not desire to disparage the declared intentions of the Administrator eventually to commit the full amount of funds authorized by Congress. However, the Administrator has indicated in the Federal Register that "[a]llotments shall be made not later than the January first preceding the beginning of the fiscal year for which authorized, except for the allotment for fiscal year 1973 which is made herein." 38 Fed. Reg. 5331, §35.910-1(d), Feb. 28, 1973. Moreover, the Administrator has not indicated in the Federal Register any intention to allot the full sums authorized by Congress. No regulations have been promulgated regarding the procedure under which these funds are to be "supplementally" allotted to the States. The only way the State of Minnesota and other States can be legally certain that all authorized funds will be made available to them for obligation is by the Administrator's adherence to the statutory allotment requirement of the Act.

C. The Amounts Authorized Were Based on National Needs to Achieve the Act's Purposes.

The designated sums in Section 207 were based on estimates of the needs of the Nation to construct and upgrade sewage treatment works to meet the requirements of the Act. The Congressional Record is replete with evidence supporting the $18 billion figure.

The National League of Cities and the U.S. Conference of Mayors estimated the total construction needs of municipalities at approximately $35 billion between the years 1972 and 1977. 118 Cong. Rec. H. 10267 (Daily ed. Oct. 18, 1972). The U.S. Environmental Protection Agency's *own* cost estimates for constructing waste treatment facilities planned for fiscal years 1972 through 1974 was $14.5 billion. The former Administrator of the Agency, William Ruckelshaus, explained in his letter to the President urging him *not* to veto the Act that the dollar figures were consistent with the needs estimate that his Agency had provided Congress.[4] The Ruckelshaus letter states in pertinent part as follows:

> The total value of construction initiated in the near-term under the enrolled bill is expected to correspond closely to the total value of construction that would have been initiated under the Administration bill. Under the Administration's proposal, communities were free to continue to initiate reimbursable projects, were not constricted by the $6 billion authorization, and could have substantially increased this amount. Reimbursable projects are precluded

[4] See also Senator Muskie's explanation of how the Conferees arrived at the authorized levels. 118 Cong. Rec. S.18548 (Daily ed. Oct. 17, 1972).

under the enrolled bill and the $18 billion contract grant authority represents a ceiling, while the Administration's $6 billion proposal represented a floor. With the projected close correspondence in a total near-term value of construction starts, the potential inflationary impact upon the entire construction sector would be minimized.

The total amount of contract grant authority contained in the enrolled bill is formulated from the Administration's estimate of construction needs as submitted to the Congress in February of this year. The total Federal share of 75% would amount to $13.6 billion. This needs estimate did not include funds for combined storm and collection sewers, or for recycled water supplies. These are project eligibilities newly specified by the enrolled bill.

This needs estimate provided to the Congress was constructed to support the commitment of the President in his State of the Union message of January 22, 1970, to "put modern municipal waste treatment plants in every place in America where they are needed to make our waters clean again, and to do it now." This commitment was repeated in the February 1970, Message on the Environment, which enunciated funding support for "every community that needs it with secondary waste treatment, and also special, additional treatment in areas of special need, including communities of the Great Lakes." The commitment was re-endorsed in the February, 1971, Message on the Environment with a statement that we should provide "adequate funds to ensure construction of municipal waste treatment facilities needed to meet water quality standards."

(Emphasis added.) 118 Cong. Rec. S. 18546 (Daily ed. Oct. 17, 1972).

Senator Muskie asked the Senate some crucial questions regarding the high costs of attaining clean water and gave the following answers:

> Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make possible life on this planet? Can we afford life itself? Those questions were never asked as we destroyed the waters of our nation, and they deserve no answers as we finally move to restore and renew them. These questions answer themselves. And those who say that raising the amounts of money called for in this legislation may require higher taxes, or that spending this much money may contribute to inflation simply do not understand the language of this crisis.
>
> The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion had to be committed by the Federal Government in 75% grants to municipalities during fiscal years 1973-75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation.

(Emphasis added.) 118 Cong. Rec. S. 16870 (Daily ed. Oct. 4, 1971).

The Court of Appeals for the District of Columbia in its decision in *City of New York v. Train, supra*, extensively reviewed legislative history that preceded adoption of the $18

disagreement with the President's dire predictions of the Act's impact on the economy.

Furthermore, it was the expressed intent of Congress that the Administrator's discretion would be limited by the purposes and objectives of the Act. Congressman Jones, in the course of his explanation of the Conference Report to the House, declared that "[t]he Congress has given to the Administrator the most explicit guidance that it could contrive as to what factors and parameters he is to take into account in the administration of this act."[37] Moreover, Senator Muskie, in discussing the Conference amendments to Sections 205 and 207, which were intended to emphasize the Administrator's obligational and expenditure flexibility, also addressed the question of the limits of the Administrator's discretion, stating that "[t]he conferees do not expect these provisions to be used as an excuse in not making the commitments necessary to achieve the goals set forth in the act."[38]

In short, the Administrator's discretion under Section 203 is limited by the letter and intent of the Act. He may not use the narrowly circumscribed authority over project approval to defeat or postpone the clean water goals of the Act.

[37]118 Cong. Rec. H 9119 (Daily ed. Oct. 4, 1972). These factors are set out in Section 204 of the Act, 33 U.S.C. § 1284 (Supp. 1974).

[38]118 Cong. Rec. at S 16871 (Daily ed. October 4, 1972).

Amici urge the Court to consider this portion of their argument most seriously. The Administrator has effectively announced in his brief[39] that if he loses this round and is required to allot, he will attempt to circumvent the Court's judgment by placing the newly allotted funds in "reserve" accounts and simply refuse to obligate them. This would obviously violate the Act, since these sums would clearly not be "available" for obligation, notwithstanding the Administrator's sophistical argument to the contrary.[40] The Court must make it plain that the Administrator must allot all sums authorized and that no alternate actions that likewise defeat the purposes of the Act will be tolerated.

C. *The Administrator's argument that he is authorized to control the "rate" of spending by controlling the timing of allotments is unsupported in the Act and is inconsistent with continual funding mechanism of "reallotment".*

The Administrator, in a vain attempt to make control over allotments equivalent to control over the "rate" of spending, now says he expects ultimately to allot the sums he has withheld.[41] By periodically augmenting the allotments, so the new argument goes, the Administrator extends the time in which the authorized sums are available and hence reduces the

[39]Brief for Respondent at 27-28.

[40]*Id.* at 28, n. 12.

[41]Brief for Petitioner at 26, 29.

"rate" of spending. This is pure sophistry. All that this accomplishes is postponement of the program and the goals it was designed to achieve. As the court of appeals noted in *City of New York:*[42]

> . . . the Act nowhere mentions any type of later augmentation procedure, and rather states in section 205(a) that "*the* allotment for fiscal year 1973 shall be made not later than . . . ." (Emphasis the Court's).

Moreover, if Congress had intended the Administrator to have the kind of control over allotment he seeks to establish in this case, there would have been scant need for Congress to provide for the mechanism of automatic reallotment. 33 U.S.C. § 1285(b)(1)(1974 Supp.). Plainly, Congress constructed the statutory mechanisms of allotment and reallotment to provide for continual funding over an extended period of time to remove the uncertainty that had plagued the grant process prior to the 1972 Act. As indicated earlier, the notion of administrative discretion to allot any given amount at any given time is totally at odds with this carefully conceived statutory scheme.

D. *Neither the doctrine of sovereign immunity nor that of political question is applicable to this controversy.*

[42]Combined Appendix at 33A.

Amici are of the firm view that the Administrator has no discretion at the allotment stages. Nevertheless, we do not believe that a contrary conclusion would require, as the Administrator contends,[43] dismissal of the suit.

First, the action falls squarely within the exception to the doctrine of sovereign immunity which allows suits against federal officials who have allegedly acted beyond their statutory powers or have exercised their statutory powers in a constitutionally void manner. *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 689 (1949). The mere fact that discretion is vested in a federal administrative officer does not mean that he has free reign to abuse that discretion, and whether an abuse has occurred, *i.e.*, whether the officer has exceeded his statutory authority, is clearly within the *Dugan* and *Larson* exception.

Moreover, sovereign immunity has been waived by the United States in cases of this sort by enactment of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*. Section 10 of the APA, 5 U.S.C. § 702, provides quite plainly and simply that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action wthin the meaning of a relevant statute, is entitled to judicial review thereof."

[43] *Brief for Petitioner at 30, et seq.*

In *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961), the court explained the impact of the APA on sovereign immunity thusly:

> By providing judicial review in an action brought by "any person adversely affected or aggrieved by any agency action" Congress permitted suits which under established tests would certainly be barred as suits against the government . . . The Act thereby makes a clear waiver of sovereign immunity in actions to which it applies." *Estrada v. Ahrens, supra*, 296 F.2d at 698.

Accord, *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 873-74 (D.C. Cir. 1970).[44]

The Administrator tries to hide behind the provision of the APA that excludes suits complaining of actions committed to agency discretion by law. 5 U.S.C. § 701(a). This Court has declared this to be a "very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). The statute here is not drawn in "broad terms," but rather in such highly detailed and specific terms as to negative even the slightest degree of discretion at the allotment stage. But assuming, *arguendo*, some discretion exists, it is certainly not unbridled. The Act's express commitment to specific deadlines and goals and the unmistakable evidence in the legislative history of

[44]"It seems axiomatic to us that one must imply, from a statement by the Congress that judicial review of agency action will be granted, an intention on the part of Congress to waive the right of sovereign immunity; any other construction would make the review provisions illusory." *Scanwell Laboratories, Inc. v. Shaffer, supra*, 424 F.2d at 874.

Congressional resolve to achieving these deadlines and goals provides ample guidelines for judicial determination of whether that discretion has been abused.

The Administrator also argues that to try to resolve whether there has been an abuse of discretion in this case would require the courts to decide a "political question."[45] The standards for determining whether this issue presents a nonjusticiable political question were provided by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962):

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards of resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarassment from multifarious pronouncements by various departments on one question. 369 U.S. at 217.

As in his Administrative Procedure Act argument, the Administrator urges again that there are no criteria by which to judge whether he has abused his discretion. The Court, however, is not being asked to take over the management of the Environmental Protection Agency, or to assume the weighty role of the

[45]Brief for Petitioner at 47.

President of the United States; it is being asked to construe a statute and to determine whether Congress intended to grant the Administrator discretion to take the action complained of here. Since *Marbury v. Madison*, it has always been "emphatically the province and duty of the judicial department to say what the law is". 5 U.S. (Cranch) 137, 177 (1803).

This Court recently reaffirmed the principle of *Marbury v. Madison* in a case in which the doctrine of political question was similarly urged as a bar to judicial review of Executive action. *United States v. Richard M. Nixon*, 42 U.S.L.W. 5237 (July 24, 1974). The issue was whether the doctrine prevented the Court from deciding whether the President had to comply with a subpoena to produce certain tape recordings and documents relating to his conversations with aides and advisers. The argument was made, as it is impliedly made here, that the Judiciary should defer to the judgment of the Executive as to what the law requires. The language used in rejecting the claim is particularly applicable to the instant controversy.

> Notwithstanding the deference each branch must accord the others, the "judicial power of the United States" vested in the federal courts by Art. III, § 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite

> government. The Federalist, No. 47, p. 313 (C. F. Mittel ed. 1938). We therefore reaffirm that it is "emphatically the province and the duty" of this Court "to say what the law is" with respect to the claim of privilege presented in this case. *Marbury v. Madison, supra* at 177. *United States v. Richard M. Nixon, supra*, 42 U.S.L.W. at 5244.

Here, too, the Court cannot concede to the Executive the intrinsically judicial determination of whether the impoundment of such vast sums of money was authorized by Congress in the Act.

CONCLUSION

The court of appeals in *City of New York* was eminently correct in ruling that the Administrator was required to allot the full amounts authorized by the Act for waste treatment construction grants. *City of New York* should therefore be affirmed and *Campaign Clean Water* should be reversed and judgment rendered for full allotment in favor of Respondent Campaign Clean Water.

Even if the Court be convinced that some discretion at the allotment stage was vested in the Administrator by the Act, *amici* would still pray that the court of appeals judgment in *Campaign Clean Water* be reversed, and the district court's judgment be affirmed, since the present state of the record — the record of the marked disparity between what the Administrator has allotted and what is really needed to meet the letter and intent of the Act — shows clearly that that discretion has been flagrantly abused.

Respectfully submitted,

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PROOF OF SERVICE

I, Philip K. Maxwell, one of the attorneys for the States of Texas, Wisconsin, Missouri, Oklahoma and Kansas, *amici* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 15th day of August, 1974, I served copies of the foregoing brief to the Supreme Court of the United States and on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Robert H. Bork, Solicitor General, Carla Hills, Assistant Attorney General, Daniel M. Friedman, Deputy Solicitor General, Edmund W. Kitch, Assistant to the Solicitor General, Robert E. Kopp, and Eloise Davies, Attorneys, Department of Justice, Washington, D.C., 20530.

2. Norman Redlich, Corporation Counsel, John R. Thompson, First Assistant Corporation Counsel, Evan A. Davis, Gary Mailman, and Alexander Gigante, Jr., Assistant Corporation Counsels, Attorneys for the City of New York, Municipal Building, New York, New York, 10007, and James R. Atwood, Covington & Burling, 888 — 16th Street, N.W., Washington, D.C., 20006, Of Counsel, in duly addressed envelopes with air mail postage prepaid.

3. Alan B. Morrison and W. Thomas Jacks, Suite 700 — 2000 P Street, N.W., Washington, D.C., 20036, Attorneys for Respondent, Campaign Clean Water, in a duly addressed envelope with postage prepaid.

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ADDENDUM I

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

May 28, 1974

TO ALL COUNSEL OF RECORD:

No. 73-3965 - State of Texas, et al, v.
No. 73-4026 - Russell E. Train, Administrator of the Environmental Protection Agency.

[Argued & Submitted 4-29-74 - N.O. West Courtroom]

Gentlemen:

I am directed by the Court to advise that the disposition of the referenced cases is being withheld pending decision of the Supreme Court in the cases *Train v. City of New York*, (73-1377), *Train v. Campaign Clean Water* (73-1378), certiorari granted April 29, 1974.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Richard E. Windhorst, Jr.
Richard E. Windhorst, Jr., Chief
Judicial Support Division

REW, Jr.:rcv

Messrs. Robert E. Kopp &
Eloise E. Davies
Mr. Theodore L. Priebe
Mr. Paul C. Duncan
Mr. Philip Maxwell
Mr. Curt Schneider

WATER FUNDS: EPA Regional Admr. Busch says Texas has received the lion's share of wastewater grants awarded in Region VI — Texas, Louisiana, Arkansas, Oklahoma and New Mexico. Of the $69,101,286 awarded in the region since July, 1973, Texas got $37,441,255. The funds come from the Congressionally appropriated $9 billion for the states in fiscal years 1973, 1974, and 1975. With two of the years over, EPA has allocated $3 billion nationwide, or $134,756,239 to States in Region IV. Busch said, "The agency expects to award much of the remaining $6 billion in the next 12 months."

Busch added, "I am extremely pleased with the progress being made in our construction grants program, and am confident that a solid base has been established to carry forward a program in achieving our goal of clean water. We will be working closely with State and local officials in the months ahead to keep the program moving. I am also pleased to announce that the States in Region VI were the first in the nation to submit their priority lists for FY '75 funds."

FUND DEFICIT: Even with Texas getting the lion's share of the Federal money available, the Water Quality Board says that **Texas cities have 204 projects that won't be funded** because Federal funds available in FY '75 are $27,000,000 short of what is needed. The WQB's project list includes $169,100,000 in projects, while available Federal funds amount to $142,100,000. Board Exec. Dir. Yantis wrote Texas members of Congress about the problem and included a detailed list of which projects will be funded and which ones are caught in the $27 million deficit. He added that "to complete construction just for this list" would require $615,000,000 in the future and $675,000,000 if related costs, such as infiltration studies, are included. Yantis said that means the real deficit in grant funds is "approximately $450 to $500 million."

Projects falling into the **$27,000,000-short and-won't-be-funded category** by Congressional district, are: **Dist 1** — Joaquin, Seven Points, Halfsville, Campbell, Omaha, Bullard, Douglassville Marietta, Murchison, Reno, Broaddus, Winfield, Tenaha, Lennius MUD and Athens; **Dist 2** — Montgomery County MUD 6, Liberty-Danville FWSD 1, Lazy River Improvement Dist. of Montgomery County, Dewers, Coldsprings, Sour Lake, Kirbyville, North Zulch MUD, Whispering Oaks, Orange, Evadale ISD, Koontze, Grapeland, Tucker ISD, Woodville, Jewett, Kennard and Hardin County WCID 1; **Dist 3** — Richardson, Little Elm, Glenn Heights, Dallas (3 projects), Murphy, Woodland Hills, Corinth and Dallas County Community College; **Dist 4** — Howe, Lindale, Highland Village, Rowlett, Kerrp, Royse City, Campbell, Bullard, Little Elm, Lake Dallas MUA, Glenn Heights, Collinsville, Aubrey, Tom Bean, Pilot Point, Fate, Corinth and Westminster; **Dist 5** — the projects in Dallas County listed in Dist 3, plus Seagoville; **Dist 6** — The projects in Dallas County in Dist 3 plus Garrett, Streetman and Hubbard; **Dists 7, 8, 18 and 22**, Harris FWSD 6, Tomball, Spenwick Place MUD, College View MUD, Clearwoods Improvement Dist, Harris County WCID 1, Port of Houston, Lomax, Harris UD 5, Fort Bend WCID 2; **Dist 9** — Galveston WCID 19, Beach City, Jefferson WCID 10, Bevil Oaks, San Leon MUD, Port of Galveston and Jefferson FWSD 1; **Dist 10** — Pflugerville, Burton, Carmine, Florence, Hays County-Wimberly WSD, Dime Box, Gladden FWSD, Clay, Sunset Valley, Hempstead, Snook, Fayett WCID and San Marcos;

Dist 11 — Gatesville, Bertram, Thorndale, McGregor, Bell WCID 4, Fort Gates, Goldthwaite, Round Rock, Hutto, Lorena, Milam WCID 1, Marble Falls WCID 1, Hewitt, Morgan, Lott, Iredell and Lacy-Lakeview; **Dist 12** — North Tarrant MWD and Saginaw; **Dist 13** — Megargel, Windthorst, Childress and Canyon; **Dist 14** — Wharton WCID 19, Victoria-Guadalupe Blanco RA, Corpus Christi and Nueces WCID 15; **Dist 15** — Port Mansfield PUD and Edcouch; **Dist 16** — Odessa, Van Horn, Goldsmith, Ft Hancock WCID 1 and Barstow; **Dist 17** — Haskell, San Saba, Anson, Tye, Rotan, Cross Plains, De Leon, Newark, Jayton, Comanche, Gainesville, Goree, Forsan and Stephenville; **Dist 19** — Shallowater, Odessa (listed in Dist 16), Abernathy, New Deal and Smyer; **Dist 20** — San Antonio (2 projects) and Somerset; **Dist 21** — those listed in Dist 20 plus Sunrise Beach MUD 1, Boerne, Junction, Fredericksburg, Crockett WCID 1, Sterling City, Brackettville, Winters, New Braunfels and Mertzon; **Dist 23** — Those listed in Dist 20 plus Carrizo Springs, Laredo, Natalia, Jourdonton, Big Wells, Dilley and Maverick County; **Dist 24** — those listed in other Dallas County districts plus Flower Mound and Sanger.